

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the testimony given at the preliminary hearing, together with the exhibits admitted into evidence and the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing that the Order of the Administrative Law Judge should be affirmed.

There is scant medical evidence in the record concerning causation. The August 3, 1996, office note of Chandy C. Samuel, M.D., states claimant's pain was caused by his lifting something about three weeks earlier. It does not specifically mention whether this happened at work, but the billing refers to "work. comp."

Claimant, the owner of respondent company (Stephen B. Hecox) and Mr. Hecox's secretary (Melvina Wilken) each testified at the preliminary hearing. Claimant states that on July 15, 1996, he was carrying a railing with a coworker when the coworker dropped his end, causing claimant to injure his low back. Claimant attempted to notify Mr. Hecox by telephone that day but was unable to reach him. Claimant testified that he told Mr. Hecox about the alleged injury the next day. Mr. Hecox admits that he spoke with claimant on July 16, 1996, but denies claimant reported an accident or a work-related injury. According to Mr. Hecox, his first notice of any alleged work-related injury was when he received notice via certified mail dated August 6, 1996.

The testimony of Mr. Hecox's secretary is consistent with that of both claimant and respondent. Melvina Wilken answers the telephone at respondent's office. She spoke with claimant on several occasions between July 15 and July 30, 1996, when claimant was terminated, but he never mentioned a work-related injury to her. She likewise stated that her first notice of any injury was the certified letter received sometime after August 6, 1996.

Respondent points to certain inconsistencies in the record in support of its position that the accident is not work related. However, respondent does not offer any alternative explanation for how claimant was injured. The primary evidence in this regard is the fact that claimant never requested medical treatment from respondent and did not seek medical treatment on his own until August 3, 1996.

The notice issue involves other contradictions in the record. Claimant testified that he did not report his injury on the day it happened because he could not reach his supervisor by telephone. However, Mr. Hecox gave claimant a card with several telephone numbers which claimant could have called but claimant only tried Mr. Hecox's cellular telephone number. Also, claimant never tried calling the office or asking Mr. Hecox's secretary where he could be reached. Furthermore, he did not tell Ms. Wilken about his injury.

Due to the conflicting testimony, the credibility of the witnesses becomes an important consideration. The Administrative Law Judge apparently found claimant to be a credible witness because he awarded benefits based upon his testimony. In weighing the evidence and considering the credibility of the witnesses, the Appeals Board takes into

consideration the Administrative Law Judge's opportunity to observe the witnesses testify. He, therefore, had a unique opportunity to judge their demeanor and assess their credibility. Accordingly, the Appeals Board takes into consideration the Administrative Law Judge's findings in this regard. Giving some deference to the conclusions of the Administrative Law Judge and based upon our review of the record as a whole, the Appeals Board finds the preponderance of the evidence supports a conclusion claimant's injury did arise out of and in the course of his employment and that notice thereof was timely given.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark dated October 8, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

c: Gary W. Kendell, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director